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Patterson v. McLean Credit Union

Oral Argument - February 29, 1988

William H. Rehnquist

We'll hear argument next in number 87-107, Brenda Patterson versus McLean Credit Union.

Ms. Hair, you may proceed whenever you're ready.

Penda D. Hair

Mr. Chief Justice, and may it please the Court.

We seek reversal of two rulings concerning the scope and application of Title 42 United States Code Section 1981.

Section 1981 guarantees to all persons within the jurisdiction of the United States the same right to make and enforce contracts as is enjoyed by white citizens.

The first issue presented is whether an employer that intentionally subjects a black worker on account of her race to onerous and discriminatory terms and conditions of employment violates Section 1981.

The second issue is whether a black employee who establishes that she was denied a promotion because of her race must additionally affirmatively prove that she was more qualified than the white worker who received the promotion in order to hold her employer liable for promotion discrimination under Section 1981.

In this case, unlike many cases of employment discrimination, the plaintiff presented extensive direct evidence that her employer engaged in blatant intentional discrimination on the basis of race.

According to the evidence, the President and General Manager of McLean Credit Union stated that black workers are slower by nature than white workers.

And he stated that he did not want to hire a black worker because they cause problems.

And there were numerous instances of racial remarks and race-based conduct that were introduced into the record including an admission by one of the Company witnesses that policy of the President was not to hire black workers.

Brenda Patterson was at first the only black worker at McLean Credit Union and later one of only two black workers and she was the victim of racial discrimination during her ten years of employment under the management of the president and general manager, Robert Stevenson.

Patterson filed suit charging the credit union with intentional discrimination in the terms and conditions of her employment and with promotion discrimination.

The District Court dismissed the claim of discrimination in the terms and conditions of employment, and the Court of Appeals affirmed.

The Fourth Circuit concluded that Section 1981 prohibits discrimination only with respect to hiring, firing and promotion.

On the promotion claim, the District Court instructed the jury that the plaintiff had the burden of proving both that she was denied the promotion because of her race, and that she was more qualified than the white employee who received the promotion.

And the Court of Appeals affirmed this jury instruction.

With regard to the scope of Section 1981, under the rule of law adopted by the Fourth Circuit, protection under Section 1981 is afforded only against refusals to enter into a contract or continue in a contractual relationship.

Under that rule of law, a black worker can get a job but the black worker can be forced to pay a very high price for that job in loss of dignity.

The employer can say to that worker, we'll hire you but only if you submit to conditions of employment in which you are humiliated and demeaned because of your race.

It is our position that that type of condition of employment is exactly the badge of inferiority that the Thirteenth Amendment and Section 1981 were designed to prohibit.

It seems obvious that a black worker who is forced to pay the price of stigma and humiliation in order to be able to perform the contract that she has a right to enter into has not been afforded the same right to make and enforce a contract.

The black worker's exercise of her right to make and enforce a contract has been burdened because of her race.

William H. Rehnquist

Well, I don't think that's crystal clear, Ms. Hair, that the consequences like you're talking about, bad as they may be, necessarily implicate the right to make or enforce a contract.

That certainly isn't an inclusive term.

Penda D. Hair

Mr. Justice Rehnquist, I would submit that the right to make and enforce a contract has to include the right to perform that contract free from racial discrimination.

If the right to make and enforce a contract is going to have any meaning, it must include the right not to be burdened in the exercise of your right to make and enforce a contract--

Byron R. White

And so you suggest then that there could have been a suit by the employee in a State court to enforce the employment contract and get an injunction against this sort of harassment based on the contract?

Penda D. Hair

--No, Justice White.

That is not my position.

My position is that it doesn't matter whether the employee, the worker who is racially harassed--

Byron R. White

Well, do you think that suit would fail?

Penda D. Hair

--In North Carolina, I believe that Mrs. Patterson would not have been able to stop the harassment in State Court under State contract law.

Byron R. White

Because it was not a provision of the contract, I take it?

Penda D. Hair

That's right.

Because she was an at-will employee.

She could be terminated under North Carolina law for any reason whatsoever including the bad faith reason.

Byron R. White

Well, now that would be a problem with both whites and blacks, I suppose.

And so if she couldn't be protected against racial harassment based on the contract, why is 1981 violated?

Penda D. Hair

Because 1981 is not concerned with what is a contract.

1981 is concerned by what is meant by the phrase, the same right to make and enforce a contract.

And that's a Federal statute that prohibits discrimination.

And it prohibits more than discrimination in the words that are written into the contract.

It prohibits discrimination in the process of making the contract.

For example, if the employer had imposed conditions on a black worker that were not imposed upon a white worker as a condition of making the contract, that would violate Section 1981.

And in this case, Mrs. Patterson, because she was an at-will employee was essentially making a new contract every day that she went to work.

William H. Rehnquist

Well, supposing, Ms. Hair, that an employer hires a black person for $50,000 and the black person later comes in and says, well, if I'd been white, they would have paid me $55,000, so they violated 1981.

Do you think if the black employee can prove that, that's a cause of action under 1981?

Penda D. Hair

Yes, I do, Mr. Justice Rehnquist.

It's intentional racial discrimination in pay.

William H. Rehnquist

So 1981 really covers everything that Title VII does?

Penda D. Hair

Practically I think that's probably correct because Section 1981 guarantees the same right to make and enforce a contract.

And my position is that when the exercise of that right is burdened by racial discrimination, the same right has not been afforded.

Byron R. White

In this case is it discrimination in the making of the contract that you're complaining about?

Penda D. Hair

I believe that it's discrimination in the making of the contract and in the enforcing of the contract.

Byron R. White

In what respect?

Penda D. Hair

In the making of the contract because Mrs. Patterson is an at-will employee under North Carolina law and everyday that she goes to work, she makes a new contract.

And in order to make that contract, she has to endure conditions of employment that are not required of a white worker.

It's the same as if the employer told her at the time that she showed up to apply for a job, we won't give you a job unless you stand in front of our factory for an hour holding a sign saying, I am inferior.

And that was not required of white workers.

That's not the same right to make a contract.

And by demeaning Mrs. Patterson, by making her dust and sweep the office,--

Byron R. White

Well, I suppose you'd make the same argument if that was a contract for six months, an employment contract for six months?

Penda D. Hair

--I think ultimately it doesn't make any difference.

In that case, if there were a fixed term of contract so that she was not making a new contract everyday, and I would still suggest that because her right to perform the contract is burdened, that she does not have the same right to make and enforce the contract as the white worker, because she is being encouraged not to enforce her contract and receive the benefits of her contract, but to cancel the contract.

That's what the racial discrimination in terms and conditions does.

It encourages cancelling the contract and not obtaining the benefits of the contract.

Antonin Scalia

Well, I mean, that's a question of proof, I would suppose, isn't it?

I mean, you're not asserting that you had to prove that the racial discrimination was of such force and effect as to make it impossible for her to perform her job, thereby causing her to break the contract.

Penda D. Hair

No.

It is not our position that she must prove constructive discharge.

It's our position that any conduct that's intentional and that's on the basis of race will affect that employee as to whether they want to continue on the job.

It may not be so bad that they actually quit, but it certainly is burdening the exercise of their right.

Antonin Scalia

What right?

It has to burden the right to either make or enforce a contract, right?

Either make or enforce.

Now, your example of the person with the sign is not really accurate.

That isn't what happened here.

If you said, before I will give you a job, you must stand outside in front for an hour with a sign that says, I'm inferior, there you are burdening the making of a contract.

But what happens here is, you give the person the job and after the job, you are making the person hold a sign that says, I am inferior.

Now, if that is so burdensome as to cause the worker to be unable to perform and therefore cause the worker to break the contract, then you're interfering with the right to enforce it, I suppose.

But I don't see how, if it doesn't rise to that level, I don't see how it burdens her right to either make or to enforce the contract.

Penda D. Hair

Well, with Mrs. Patterson, because she is an at-will employee and she makes the contract every day, I would contend that she is in exactly the same position as the person who is told to hold the sign for an hour before they will be hired.

But even assuming that we're dealing with a person that had a fixed contract, because it has the impact on that person of treating them differently and discouraging them, making them think about whether they want to continue, it doesn't actually have to cause them to quit the job.

It discourages them in enforcing the contract and therefore they have not been afforded the same right to enforce their contract.

There doesn't have to be an absolute barrier against enforcement of the contract which is what constructive discharge would be.

It's just a violation of the same right to enforce the contract.

She has not been afforded the same right to carry out that contract, enforce the contract, and enjoy the benefits of that contract as the white worker.

Sandra Day O'Connor

Ms. Hair, I take it the Solicitor General supports reversal here, but makes an effort to link the theory to the language of Section 1981 in referring, as has been suggested by other Justices this morning, the the making and enforcement.

And as I understand it, the SG would say if there's an implied covenant under State law of good faith and fair dealing, that can be relied upon to show that somehow she was prevented or hindered in her performance under the contract, that that would support reversal.

Penda D. Hair

The Solicitor General, as I understand his position, comes to the conclusion, as does the Fourth Circuit, that Section 1981 directly protects only the right to enter into a contract, regardless of the conditions of employment after the contract.

Sandra Day O'Connor

Well, I didn't understand it that way, since they refer and rely on the implied obligation of good faith and fair dealing in the enforcement of it.

Penda D. Hair

Yes, Justice O'Connor, When I said, directly, I meant without looking at State law.

The Solicitor General then says, we can look at State law and if State law gives a breach of contract remedy to a person like Mrs. Patterson, that would be read into and enforceable--

Sandra Day O'Connor

And express or implied.

Penda D. Hair

--Express or implied, that would be read into and enforceable under Section 1981.

Again I believe that the Solicitor General focuses on the wrong issue.

I would agree that it's appropriate to look to common law to decide what is a contract.

But we have a Federal statute that protects the same right to make and enforce a contract.

And the Solicitor General, by limiting that right only to terms that are read into the contract under State law, does not give effect to the Federal principle of equality that's set out in that language, same right to make enforce.

Sandra Day O'Connor

Well, it does see, though, to at least address itself more to the context and language of the Statute.

Penda D. Hair

Well, when you say the context of the Statute, what the Solicitor General's approach would do if it had been accepted in 1866 is that it would have incorporated the black codes into the contracts of black workers.

And there is no indication that Congress when it was acting in 1866 wanted to limit the coverage of Section 1981 to what State law provided.

In fact, the indication is to the contrary that Congress was expressly concerned with overruling the black codes which limited and put onerous conditions on the black worker's ability to enter into contracts.

And if there's any doubt about--

Anthony M. Kennedy

I don't understand why that follows from the Solicitor's position.

You were saying that if a State has a law that impacts explicitly on racial minorities that this law can be incorporated into the contract without violating 1981?

Penda D. Hair

--What the Solicitor General said, as I understand it, is that you look to State law to determine what rights are protected under Section 1981.

And my position is that you look to Federal law.

That this is a Federal statute, an equality statute, and that Congress explicitly did not want to look to State law when it enacted Section 1981; it wanted to overturn the black codes.

Anthony M. Kennedy

Well, there's a difference, isn't there, between State laws that differentially impact on racial minorities and those that are neutral.

The covenant of good faith is a neutral term.

Penda D. Hair

That's true but there is absolutely no indication that Congress wanted State law to govern the scope of Section 1981.

And let me say with respect to the covenant of fair dealing, that concept really doesn't provide any additional protection beyond what the Fourth Circuit would have provided in covering absolute refusals to enter into contracts.

Because in North Carolina, and in all but four States in the United States, where there is at-will employment, the covenant of good faith and fair dealing simply does not apply to the worker.

The employer has the right to fire the worker, except in four States, for any reason whatsoever, including bad faith, and therefore that employer has the right to harass that worker until she quits.

And the only possible situation under which the Solicitor General's theory would apply is a situation where the worker could quit and claim constructive discharge, but does not quit, stays on the job and instead sues under Section 1981.

William H. Rehnquist

That would be protected by Title VII, wouldn't she?

Penda D. Hair

The worker would be protected by Title VII, if Title VII covers her employer.

But the Court in Johnson v. Railway Express made very clear that the fact that Title VII provides a remedy does not mean that Congress wanted to undo any of the remedies that were provided by earlier Civil Rights Acts.

William H. Rehnquist

That's perfectly true but the fact that Title VII covers a lot of this perhaps would suggest to us that we not strain to develop an independent body of Federal contract law governing the terms of contracts.

Penda D. Hair

I would suggest that it's not an independent body of Federal contract law.

It's a Federal equality law, a Federal antidiscrimination law, and in this case, the type of conduct that Mrs. Patterson complains of, while actionable under Title VII, Title VII would not provide an adequate remedy because Title VII does not provide compensatory damages or punitive damages.

And unless the employee quits her job, unless the conduct is so severe that she quits her job, she's not going to have a significant back pay claim because she's still on the job.

So the only way that employees are going to have an incentive to sue to stop this kind of conduct is if Section 1981 covers it.

And the remedies that Congress wanted to make available to supplement Title VII are made available under Section 1981.

Antonin Scalia

Ms. Hair, I don't see how you can run away from State law and say it's just a matter of Federal law.

I mean, you have a statute that says a black person shall have equal right to make and enforce contracts.

Now, you're either saying that we're going to develop a Federal law of contracts, or what you have to look to in each case is what rights do these State citizens have under State law to make contracts and enforce contracts and are those rights being given equally.

Now, doesn't that put us right in the middle of deciding what the State law is concerning contracts?

Penda D. Hair

I do not believe it does, Justice Scalia.

I believe that what the court is asked to do under Section 1981 in this situation, as in all other situations where it enforces Section 1981, is to develop a Federal law of what constitutes discrimination.

And Section 1981 was intended to address discrimination.

Antonin Scalia

It may be, but only discrimination in the making and enforcing of contracts.

It's not discrimination in the open air.

It's discrimination in one field.

Now, don't you think that this has... it either refers to a Federal contract law or to State law of contracts.

And you think it's a Federal contract law that we have to develop?

Penda D. Hair

No, I don't think that you have to develop a Federal law that tells you what is in a contract.

My position is that regardless of what is written in the contract, what are the terms of the contract, if the plaintiff is burdened in performing that contract because of her race, that she has not been afforded the same right to make and enforce a contract.

And I think the Court's cases make clear that Section 1981 and the parallel provision, Section 1982, go beyond merely guaranteeing an absolute right to enter into a contract.

In the case of Tillman v. Wheaton-Haven, under Section 1982, the Court ruled in that case, and again, it did not rest its decision on State property law.

That case involved the right to purchase and hold property under Section 1982, and the right to join a swimming pool association was not a right that was protected under State law.

In fact, under State law it was clear that the swimming pool association had the right to exclude blacks.

And furthermore, the right to join the swimming pool association was not a right that was in the purchaser deed of the house at issue.

The owner of the house had no control over the swimming pool association and the membership in the swimming pool association could not be conveyed along with the ownership of the house.

And nonetheless, the Court held that the membership in the swimming pool association was a benefit that became associated with home ownership because a third party voluntarily made it available to persons in the area, and that the persons who were making it available could not make it available on a racial basis.

Byron R. White

I take it that you're saying that the employer here conditioned the contract on being willing to put up with harassment?

Penda D. Hair

Certainly conditioned performance of the contract.

Byron R. White

Is that it?

Penda D. Hair

Yes, on willingness to put up with harassment.

Otherwise, Mrs. Patterson, it was an absolute requirement that she put up with this harassment in order to continue to work there and perform the contract that she was making on a day by day basis.

Byron R. White

It's sort of like saying, well, I'll hire you even though you're black as long as you're willing to accept lower wages.

Penda D. Hair

That's exactly the same situation in my view.

Anthony M. Kennedy

Suppose this case.

An employer hires a person from a racial minority on absolutely equal conditions.

Then a supervisor comes in here for 30 days and causes great humiliation and degradation.

The employer then fires the supervisor.

Cause of action under 1981?

Penda D. Hair

It might depend on the level of the supervisor.

I think in the Vincent case which dealt with the issue of sexual harassment under Title VII, the Court explicitly left open--

Anthony M. Kennedy

Assume a high level supervisor who had general authority to act this way, although without the employer's actual knowledge.

Penda D. Hair

--Again, I think it would depend on the facts of the case.

I assume that you're asking me two questions.

One, is thirty days' worth of harassment actionable.

And two, can the employer be held responsible for that supervisor when it was a temporary assignment and they fired him.

And on the second issue on whether the employer can be held liable.

I think the Court left that open in Vincent under what circumstances if the employer took very prompt action.

And I would see no reason that the same agency principles that apply under Title VII according to Vincent would not also apply under Section 1981.

On whether thirty days of harassment is sufficient to state a cause of action, again, I think you would have to look at the facts of what happened during that thirty days.

I certainly think there could be conduct that's so egregious that even if it only occurred on one or two days that--

Anthony M. Kennedy

So what's the standard, egregious conduct?

Penda D. Hair

--No.

I think the standard is whether the same right to perform the contract has been afforded.

Anthony M. Kennedy

Well, we know.

We know that white persons were not subjected to this indignity and black persons were.

We know.

That's stipulated in the hypothetical.

Penda D. Hair

Well, again, if the conduct is intentional and it's on the basis of race and the black person is treated differently than the white person because of race, then that is not the same right to make and enforce a contract in my view.

Anthony M. Kennedy

So your answer is, there is a cause of action in the hypothetical?

Penda D. Hair

Well, given the stipulations that you have given me, I think that that is my answer.

Yes, Justice Kennedy.

Byron R. White

You have another part to your case, I think.

Penda D. Hair

Yes, Justice White.

I will briefly address the second issue which is the jury instruction.

In this case, Mrs. Patterson was required to prove both that she was denied a promotion on account of race and that she was more qualified.

And that simply is not the law.

The question is whether she was denied the promotion on the basis of race.

There are a number of circumstances in which a person can be denied a promotion on the basis of race, without necessarily being more qualified than the person who received the job.

The most obvious example is where the two candidates were equally qualified.

And even if this employer had promoted fifty whites who were equally qualified with the fifty blacks that it rejected, none of those fifty blacks would be able to bring a case under Section 1981 for promotion discrimination because none of them could prove that they were more qualified.

They were equally qualified.

But an employer is not allowed to choose among equally qualified candidates on the basis of race, and in this case there was more than sufficient evidence to lead to the conclusion that the promotion decision was being made on the basis of race.

Byron R. White

Now, did the employer claim that it was on the basis of qualifications?

Penda D. Hair

The employer articulated the alleged superior qualifications.

Byron R. White

And you think you proved that was a phony?

Penda D. Hair

I think that there was certainly sufficient evidence in the record to allow the jury to conclude, if properly instructed, that the decision was made on the basis of race.

If there are no further questions, I would reserve the rest of my time for rebuttal.

William H. Rehnquist

Thank you, Ms. Hair.

Mr. Davis, we'll hear from you now.

H. Lee Davis, Jr.

Mr. Chief Justice, and may it please the Court.

This case presents the first opportunity that I'm aware of for the Court to differentiate between the rights available under Title VII as opposed to the rights available under Section 1981.

The petitioner's case in the first instance is a case of adverse working conditions and she bases that case of adverse working conditions on several pieces of evidence of discrete acts.

That is that the President of the credit union stared at her, that he criticized her work, that he made two discrete racial remarks, one in 1972 and one in 1976.

Her allegations of excessive work load.

The question presented to this Court is whether these acts of alleged racial harassment standing alone present a cognizable claim under Section 1981.

I believe that it's obvious that the terms conditions and privileges of employment language which is in Title VII would cover alleged racial harassment, adverse working conditions.

The language in Section 1981, however, is a different kind of language.

The language there is to make and enforce contracts.

And I believe that they're two different things, so I hope that this Court will take the opportunity to define and differentiate the various rights available under each of the two statutes.

Part of the problem in understanding what rights are available in the statutes is the fact that many of the lower courts have used the term, discrimination, synonymous with various things.

As you read the cases, you'll find that discrimination sometimes means racial harassment.

Sometimes discrimination means adverse working conditions.

Sometimes discrimination means disparate treatment in hiring, firing, promotion, wage discrimination.

In this case, we're dealing with discrimination as it means abusive working environment, hostile working environment--

Sandra Day O'Connor

Mr. Davis, why would a plaintiff select 1981 as the basis of the suit instead of Title VII, possibly?

H. Lee Davis, Jr.

--Why would any plaintiff or why would this plaintiff?

Sandra Day O'Connor

Yes, why would any plaintiff?

H. Lee Davis, Jr.

I suppose, Justice O'Connor, the reason--

Sandra Day O'Connor

The statute of limitations may have been the question here.

H. Lee Davis, Jr.

--Well, she received her right to sue letter in this case and had the opportunity to bring her Title VII in this action.

I presume the reason to try to pursue a Section 1981 claim would be the opportunity for greater monetary reward with compensatory damages and punitive damages available.

That would be my assumption as to why a plaintiff would attempt to pursue a claim under Section 1981.

Anthony M. Kennedy

Well, is it your position that once the contract is made, there is no conduct of the employer that's so onerous that it's not actionable under 1981 if it's racially motivated?

H. Lee Davis, Jr.

I think any conduct of the employer which is racially motivated which impacts on the right to make and enforce contracts is actionable.

Anthony M. Kennedy

Well, assume that a contract is made in good faith and in non-discriminatory terms, but once its performance begins, highly onerous conditions are imposed.

Are there no conditions that are so onerous that 1981 would not be implicated?

H. Lee Davis, Jr.

I don't think there are a separate and independent issue.

Now, if those onerous oppressive opprobrious conditions, excessive hostile working environment conditions impact on a promotion decision, impact on a termination decision.

Anthony M. Kennedy

It has to be promotion or termination?

H. Lee Davis, Jr.

Well, the Fourth Circuit limited that somewhat.

I'm not sure, Justice Kennedy, that it wouldn't also impact, if it impacted on a wage discrimination case, I think that the economic impact there may be sufficient to come under Section 1981.

Anthony M. Kennedy

There are standard doctrines in contracts of frustration of purpose, are there not?

H. Lee Davis, Jr.

Yes, there are.

Anthony M. Kennedy

If the employment contract becomes frustrated of its purpose by reason of racial discrimination, is 1981 applicable?

H. Lee Davis, Jr.

I don't think a constructive discharge case is actionable, if that's what you're getting to.

Anthony M. Kennedy

Why?

H. Lee Davis, Jr.

Excuse me.

A constructive discharge case would be actionable if the employee terminated.

Anthony M. Kennedy

Because that is the denial of the right to make a contract or to enforce it?

H. Lee Davis, Jr.

Enforce the contract, because the level of opprobrious conduct became so great, if the evidence supports that, that the employee could no longer continue the employment.

Sandra Day O'Connor

Well, Mr. Davis, what about the SG's argument that if under State law, there's an implied obligation or duty of good faith and fair dealing that 1981 can be implemented?

H. Lee Davis, Jr.

If that is correct and if that is true, then I believe that an employee would have a cause of action in State court.

Sandra Day O'Connor

Well, this case wasn't analyzed on that theory so presumably it would be appropriate then to send it back and let the Court make that kind of analysis if we agreed with the SG?

H. Lee Davis, Jr.

There was no claim for relief.

There was a claim for relief for intentional infliction of emotional distress, a pendant State claim.

Byron R. White

I think that your colleague on the other side indicated there would be no cause of action under North Carolina law.

H. Lee Davis, Jr.

Well, I think there is a cause of action for a breach of the contract of fair dealing.

Now, whether such a case has been found cognizable for racial conduct, for hostile working environment of racial conduct, I don't know of any North Carolina case that would uphold that.

But I know of no reason why they shouldn't if it in fact meets the elements of that cause of action

under North Carolina law.

Byron R. White

But I want to make it clear that you interpret enforce as covering the situation where a contract is frustrated of its purpose.

H. Lee Davis, Jr.

I'm sorry, I didn't understand the question.

Byron R. White

Do you interpret, enforce, in the statute to cover a situation where there is a frustration of the contract's purpose by reason of racial animus?

H. Lee Davis, Jr.

I think it if causes a termination, yes, sir, that would then be a constructive discharge case which would be cognizable under Section 1981, the right to enforce the contract.

Byron R. White

You don't think enforce means just the right to go to a State court for relief?

H. Lee Davis, Jr.

I believe the lower courts have held, I believe there are decisions which allow you to bring a constructive discharge case under Section 1981 which I think is the question that you've asked me.

Byron R. White

But you would not limit it to that?

H. Lee Davis, Jr.

I don't think so, Your Honor.

Antonin Scalia

You think enforcing a contract means not taking it to Court but how else do you enforce a contract?

H. Lee Davis, Jr.

I believe that what Section 1981 grants is the competence and the capacity to take your case to Court.

Antonin Scalia

It doesn't say, make and perform.

It says make and enforce, doesn't it?

H. Lee Davis, Jr.

That's correct.

I believe you have the right to enforce your contract.

Antonin Scalia

Well, we've been talking as though it reads, make and perform, haven't we?

H. Lee Davis, Jr.

No, sir, I don't think so.

Antonin Scalia

How does constructive discharge come into the question?

H. Lee Davis, Jr.

Because--

Antonin Scalia

Unless you're talking make and perform?

H. Lee Davis, Jr.

--I think the cases have held that a constructive discharge where the employee has been forced to resign then therefore they no longer have the opportunity to enforce their contract.

Antonin Scalia

Enforce it or perform it?

I mean, constructive discharge means you stop somebody from performing his contract.

H. Lee Davis, Jr.

Well, maybe I'm having difficulty--

Antonin Scalia

You see no difference between performing a contract and enforcing a contract?

H. Lee Davis, Jr.

--I suppose so in that definition.

Anthony M. Kennedy

You agree with the SG in this case, then?

H. Lee Davis, Jr.

No, I don't.

Anthony M. Kennedy

Well, what's the difference between you on this point?

H. Lee Davis, Jr.

Well, I don't agree with SG as to the facts of this case.

I don't agree that there was a cause of action which existed for frustration of the contract under these facts.

I have no problem with the petitioner in this case bringing a state action for breach of the implied warranty of good faith and fair dealing.

Anthony M. Kennedy

But it's just a disagreement among you as to how his standard applies to the facts of this case?

H. Lee Davis, Jr.

Yes, sir.

Antonin Scalia

And you would say, I really don't see what you've accomplished by the line you're seeking to draw.

You say constructive discharge would do it.

I'm not aware that to establish constructive discharge, you have to quit.

You could continue working and just say that the oppression was such that effectively--

H. Lee Davis, Jr.

I believe, Justice Scalia, the line of lower court decisions hold that termination or quitting is an element of constructive discharge.

Antonin Scalia

--You have to prove that in every case.

All right.

May I ask you, you suggested that under North Carolina law, thee is a cause of action for breach of an implied covenant of fair dealings such as the Solicitor General refers to.

Does that cause of action exist when the employment is at will?

Your opponent says, no.

H. Lee Davis, Jr.

I don't know of any cases, Justice Stevens, holding that.

Part of the problem in understanding the lower court cases is the language.

Discrimination has been intermingled so much in Title VII and Section 1981 cases.

Often times, the plaintiff--

William H. Rehnquist

We're really here to decide this case for ourselves.

Perhaps understanding the lower court cases may be helpful in that regard, but you know, the reason we granted certiorari in this case was presumably to render a decision of this Court, rather than to adopt lower court cases.

H. Lee Davis, Jr.

--Yes, sir.

I believe that Section 1981 primarily grants competence and capacity to make and enforce the contracts.

Title VII grants a cause of action for racial harassment, for hostile working environment, and it is under that Section that this plaintiff, this petitioner could have brought her claim.

Byron R. White

Well, I suppose you would agree that if an employer puts a condition on contracting with a black that he doesn't insist on with a white, that there's a 1981 cause of action?

H. Lee Davis, Jr.

If he puts a condition--

Byron R. White

I will, sure, I'll hire you if so and so.

And it's a condition that he just doesn't insist on with whites.

H. Lee Davis, Jr.

--I think that's in the making of the contract.

Byron R. White

Yes.

H. Lee Davis, Jr.

Yes, sir.

Byron R. White

So that if an employer expressly said to a black, I'll hire you but remember there's a lot of harassment going on in this work place and you have to agree to that.

H. Lee Davis, Jr.

I think that's a condition attached, a racial harassment which impacts the making of the contract.

Byron R. White

But you don't think that analysis applies here?

H. Lee Davis, Jr.

No, sir.

Byron R. White

Why not?

H. Lee Davis, Jr.

Because in this case, the allegations were not part of the contract.

They were conduct, hostile working environment.

Byron R. White

It went on, say it went on everyday and this was an employment at will?

H. Lee Davis, Jr.

It's a Title VII claim, it's not a Section 1981 claim.

If there are no other questions with regard to the harassment claim, I'd like to go into the promotion claim briefly.

The petitioner has written a magnificent brief concerning all of the ways that you can support your claim for punishing discrimination, none of which are applicable to this case.

In this case, the petitioner came into Court and said three years ago, this Company gave a promotion to somebody else who was working in an entirely different job responsibility, had entirely different functions and you promoted her from account junior to account intermediate.

And I should have had that job.

Faced with that evidence, the articulated reason for giving that promotion was well, this lady's been performing her job satisfactorily and we gave her a pay increase.

And we gave her an upgrade in job description and job scale pay scale and gave her a pay increase.

Under the McDonnell-Douglas proof scheme, after the Court had indicated that the prima facie case had been met, that was our responsibility, that was our burden of persuasion.

The petitioner--

William H. Rehnquist

You're arguing now about the instruction, right?

H. Lee Davis, Jr.

--Yes, sir.

And the correct law with regard to the burden or the burden of proof of the petitioner after we have articulated a nondiscriminatory reason for our decision, our nondiscriminatory reason being, number one, the petitioner was not qualified for this job.

She was a clerk, a file clerk.

This was an accountant bookkeeper position.

William H. Rehnquist

Well, what if your client, the Credit Union, promoted exclusively by seniority and wasn't particularly interested in qualifications, just whoever had been in line longest would be enabled to have the promotion.

Now, an instruction like this wouldn't be warranted in that case, would it?

H. Lee Davis, Jr.

No, sir, I don't think it would.

But there's absolutely no evidence that seniority, education or any other thing was a criteria in this particular promotion.

William H. Rehnquist

Well, was it conceded by the petitioner in this case that qualification or performance was the only standard for a promotion?

H. Lee Davis, Jr.

I don't think the petitioner conceded anything in this case.

This lady was in the job, sitting at a desk doing the job.

One day she was an account junior, next day she was an account intermediate and had a raise.

William H. Rehnquist

Well, was there any evidence introduced by the petitioner indicating that performance and qualification was not the only criterion for promotion?

H. Lee Davis, Jr.

No, sir.

No, sir, no evidence whatsoever.

After the respondent, the credit union, had articulated this nondiscriminatory reason for their decision, that is, the qualifications of the lady doing the job, the petitioner offered no further evidence, but simply relied on these various allegations of this ten year course of conduct of hostile working conditions to say that the decision by the credit union was racially motivated.

Byron R. White

And the reason given was a sham I suppose?

H. Lee Davis, Jr.

I suppose.

Although there's no evidence of that.

The various ways which the petitioner says that you can prove pretext--

Byron R. White

How does this all lead to approving the instruction that was given?

H. Lee Davis, Jr.

--Because I believe, Justice White, that under these facts, there was no evidence of anything other than qualifications upon which--

Byron R. White

I know, but what was the instruction on?

H. Lee Davis, Jr.

--The instruction was that in order for the petitioner to prevail, she must show that she was more qualified than the lady who received the promotion.

Byron R. White

But the reason the employer gave was that she wasn't qualified for the job.

H. Lee Davis, Jr.

In the first instance, she wasn't qualified and in the second instance, her qualifications did not meet the qualifications of the lady who had the job.

Byron R. White

Well, and so you think that the instruction was nevertheless proper that she had to prove she was more qualified?

H. Lee Davis, Jr.

After we had met our burden of persuasion of showing that relative qualifications were the reason for our decision, I believe under Burdine, if we have the right to choose between equally qualified candidates, then it then is her burden to show that she is more qualified.

John Paul Stevens

Yes, but may I ask, do you think you have the right to choose between equally qualified candidates on the basis of race?

H. Lee Davis, Jr.

The right to choose between equally qualified candidates absent any evidence of any other illegal

motive.

John Paul Stevens

But supposing she offered evidence that the plaintiff was denied the promotion because of her race?

That they were equally qualified.

The only difference between the two was that one was black and one was white and that because one was white, that one was promoted?

H. Lee Davis, Jr.

I suppose under that then she would have a jury issue as to--

John Paul Stevens

But then if you concede that, the instruction's wrong.

H. Lee Davis, Jr.

--No, sir, I don't believe it is, because there's no evidence that race was a factor.

John Paul Stevens

Well, forget the evidence.

Forget the evidence.

I'm just asking you about the instruction.

So supposing the evidence shows that they're absolutely equally qualified.

And the plaintiff says, yes, they were equal and they had to figure out some way to break the tie.

They could have flipped a coin, they could have done it by alphabetical, they could have done it by age, they could have done it by dark hair versus light hair, but they did it because of race to break a tie.

Is that permissible?

H. Lee Davis, Jr.

I don't think that's permissible.

John Paul Stevens

Well, the instruction says it is.

H. Lee Davis, Jr.

No, sir, I don't believe the instruction says that.

I think what the instruction says is, to the jury, if you find the decision was based on race--

John Paul Stevens

That's one of four factors.

The third factor was also that she was more qualified.

H. Lee Davis, Jr.

--And the reason for that is because the evidence which we presented in rebuttal of the prima facie case was that qualifications were the reason, and the petitioner offered no evidence to rebut that to show that, no, the decision was based on race.

Antonin Scalia

But the lack of evidence, it seems to me is a reason for never sending the case to the jury, not a reason for sending it to the jury with the wrong instruction.

It may well be that there was no evidence that the two of them had equal qualifications and race was the reason for choosing between two people with equal qualifications.

But in that case, the remedy was that it should never have been sent to the jury, and you should have appealed on that ground if the jury verdict wasn't set aside.

But you're not asking that.

You're asking for the giving of erroneous instruction, instead.

H. Lee Davis, Jr.

I agree this case should never have gone to the jury on that issue.

It went to the jury, I think, under the facts of this case where the only evidence for the decision was

promotion.

Antonin Scalia

But that's what your brief boils down to.

You say, there wasn't evidence.

That may well be, but that means that no instruction should have been given, not a wrong one.

H. Lee Davis, Jr.

Unfortunately, the trial judge opted to present the case to the jury.

Thurgood Marshall

Mr. Davis, you talk about no evidence.

What about this flat statement that negroes are just slower than everybody else?

What do you do with that?

H. Lee Davis, Jr.

Justice Marshall, I dare say that there are a few of us in the world who have not had a prejudice thought or made a prejudice comment whether the prejudice may be racial, sexual or religious or some other basis.

Thurgood Marshall

What do you do?

Just ignore it?

H. Lee Davis, Jr.

No, sir, I don't think you ignore it.

Thurgood Marshall

Well, how did you accommodate it?

H. Lee Davis, Jr.

I believe, Judge, that just because... and that statement by the way was contradicted.

That wasn't given.

Thurgood Marshall

Everybody's heard it before.

H. Lee Davis, Jr.

I don't think that taking one piece of evidence made in 1976 made in 1976.

Thurgood Marshall

Well, you've taken 87 other pieces.

I'm going to take one piece.

And I still haven't gotten an answer to it.

H. Lee Davis, Jr.

Yes, sir.

I don't think that was sufficient, Your Honor, to allow a submission of this issue.

I don't think that piece of evidence is sufficient to say that this decision, this promotion decision was based on a racially discriminatory, made in a racially discriminatory context.

Thurgood Marshall

Was race a part of the decision?

H. Lee Davis, Jr.

In this case?

Thurgood Marshall

Yes.

H. Lee Davis, Jr.

No, sir.

Thurgood Marshall

No?

H. Lee Davis, Jr.

No, sir.

Thurgood Marshall

Well, what showing do you have that he didn't use race twice, I mean three times.

He used it twice, didn't he?

Well, how do you know he didn't use it the third time?

What evidence do you have that he didn't?

What statement do you have that he didn't?

H. Lee Davis, Jr.

That this girl was sitting in this desk doing this job.

There was no job opening.

There was no position available.

The lady was a bookkeeper accountant.

She received an increase in pay grade.

Byron R. White

You say it was a position that wasn't there before?

H. Lee Davis, Jr.

They changed her title is what they did.

She was doing the same job.

She didn't change her job responsibilities.

They changed her title from account junior to account intermediate.

Byron R. White

They created a job with a higher grade.

H. Lee Davis, Jr.

Well, they had two or three people in the bookkeeping accounting department doing bookkeeping accounting functions, much like having three lawyers in a law office who are associates, and one day you promote one to partner and you still have two associates.

They didn't create a new position.

They didn't create a new job or a new job title... they did create a new job title but no new position, no new job opening.

Thurgood Marshall

Is there any evidence in this record that your client did anything concerning those two statements made by the supervisor?

H. Lee Davis, Jr.

Is there any evidence in the record that he did anything with regard to those statements?

Thurgood Marshall

Yes, sir.

H. Lee Davis, Jr.

No, sir, I'm not aware of any.

Thurgood Marshall

Thank you.

Did she complain about those statements before this lawsuit?

H. Lee Davis, Jr.

Not to my knowledge.

Antonin Scalia

You really don't know that you brought it to anybody's attention?

H. Lee Davis, Jr.

No, sir, there's no evidence that she brought it to anybody's attention.

Thurgood Marshall

It's in the record that he did say it and it's uncontradicted.

H. Lee Davis, Jr.

No, sir, I don't think it's uncontradicted.

I think he denied it.

Thurgood Marshall

Well, is it contradicted?

If so, on what page?

H. Lee Davis, Jr.

I'm sorry, sir, I don't know that.

Thurgood Marshall

Do you think it was contradicted?

H. Lee Davis, Jr.

To my knowledge, he contradicted those statements.

Thurgood Marshall

In the statement?

Well, I'll look in the record and find it for you.

I'll do you that service.

And guess what if I don't find it?

H. Lee Davis, Jr.

If there are no other questions, thank you.

William H. Rehnquist

Thank you, Mr. Davis.

Ms. Hair, you have three minutes remaining.

Penda D. Hair

May it please the Court.

In my initial argument, I did not reach the legislative history of Section 1981.

If there's any doubt about the language of the Statute, the legislative history makes it overwhelmingly clear that what Congress was concerned about was onerous treatment, onerous conditions of employment that former slave owners were putting on former slaves and other black workers including whipping them, stopping talking on the job, all the way from things that might be considered miner such as talking on the job to whipping, were the types of treatment that Congress was concerned about.

With regard to your question, Justice Scalia, about whether Section 1981 guarantees an equal right to perform a contract, I believed that the Court reached that conclusion in footnote 78 of the Jones v. Mayer, although Jones was a Section 1982 case; footnote 78 discussed Section 1981, and it held where a group of whites terrorized blacks in order to stop them from performing their contract, that those whites had violated the rights of blacks under Section 1981 to dispose of their labor by contract.

With regard to the jury instruction, this is not a case where there were no facts to support the conclusion that the reason given was a sham and that the real reason was racial discrimination.

Justice Marshall referred to two racial statements.

I counted nine different racial statements made by the President of the company.

And Justice Scalia, you asked whether Mrs. Patterson complained about those statements.

The record shows that another employee did complain about the statements and not only statements, he complained about discrimination and refusal to hire a black computer operator.

And that employee was fired.

The District Court found that there was sufficient evidence to submit the promotion claim to the jury and particularly the District Court relied on the fact that Mrs. Patterson introduced evidence to suggest that Susan Williamson was trained for the job for a period of time before she was actually promoted, and she was put into training for that job at a time when she had failed in her training for a computer operator job, and was brought back over, put into a new job.

There was a vacancy that somebody else was filling, and then after she received the training, she was actually promoted into that job.

And given the direct evidence in this case, given the evidence of training, it's simply not true that the jury instruction was harmless, which is essentially what Mr. Davis' argument boils down to.

If there are no further questions, I have nothing further.

Thank you very much.

William H. Rehnquist

Thank you, Ms. Hair.

The case is submitted.